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Supreme Court of The United States

October Term, 1959

No. 466

LARRY DAYTON HUDSON, PETITIONER

vs.

NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF THE STATE OF NORTH CAROLINA

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OPINIONS BELOW

The Petitioner prosecuted and was heard upon a petition invoking the North Carolina Post-Conviction Hearing Act, and this was denied by the Judge of the Superior Court on September 29, 1958 (R. 61, 62, 63, 64).

The Petitioner applied for a Writ of Certiorari to the Supreme Court of North Carolina, and this application was denied on January 15, 1959, without opinion (R. 64).

The Petitioner was sentenced on March 14, 1958 (R. 55), and the Petitioner gave notice of appeal to the Supreme Court (R. 56). On June 26, 1958, the Petitioner having failed to prosecute his appeal, the same was adjudged to have been abandoned by the Judge of the Superior Court (R. 58). These orders are not reported in the Official Reports of the Supreme Court of North Carolina, and the orders and judgments of the Superior Courts of the State, which are Courts of general jurisdiction, are recorded in the minutes of the Clerks of

the various Superior Courts, and there are no official reports of this Court.

JURISDICTION

Petition for Certiorari was filed in this cause on April 10, 1959, and was granted by this Court on October 12, 1959, by virtue of the provisions of 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner invokes a portion of the Fourteenth Amendment of the Constitution of the United States, as quoted below:

> "Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 11, of the North Carolina Constitution, is as follows:

> "*In Criminal Prosecutions.*—In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty."

STATUTES OF NORTH CAROLINA INVOLVED

General Statutes of North Carolina, Sec. 15-4, is as follows:

> "*Accused Entitled to Counsel.*—Every person accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense."

North Carolina General Statutes, Sec. 14-70, is as follows:

"Sec. 14-70. *Distinction between grand and petit larceny abolished.*—All distinctions between petit and grand larceny, where the same has had the benefit of clergy, are abolished; and the offense of felonious stealing, where no other punishment shall be specifically prescribed therefor by statute, shall be punished as petit larceny, is: Provided, that in cases of much aggravation, or of hardened offenders, the court may, in its discretion, sentence the offender to the State's prison for a period not exceeding ten years."

North Carolina General Statutes, Sec. 14-72 (Cumulative Supplement of 1959), is as follows:

"Sec. 14-72. *Larceny of property, or the receiving of stolen goods, not exceeding one hundred dollars in value.*—The larceny of property; or the receiving of stolen goods knowing them to be stolen, of the value of not more than one hundred dollars, is hereby declared a misdemeanor, and the punishment therefor shall be in the discretion of the court. If the larceny is from the person, or from the dwelling or any storehouse, shop, warehouse, banking house, counting house, or other building where any merchandise, chattel, money, valuable security or other personal property shall be, by breaking and entering, this section shall have no application: Provided, that this section shall not apply to horse stealing. In all cases of doubt the jury shall, in the verdict, fix the value of the property stolen."

QUESTIONS PRESENTED

The State of North Carolina submits the following as the questions presented in this case:

(1) Were Petitioner's constitutional rights, as guaranteed by the Due Process Clause of the Fourteenth Amendment, violated, under the circumstances of this case, by the Court's failure to appoint counsel for Petitioner upon request?

(2) Were the Petitioner's constitutional rights, as guaranteed by the Equal Protection of the Laws Clause of the Fourteenth Amendment, and the Due Process Clause of the

Fourteenth Amendment, violated, under the circumstances of this case, because of the Court's failure to appoint counsel for Petitioner upon request when other defendants with adequate means were entitled to the benefit of counsel under State Law?

STATEMENT OF THE CASE

The State of North Carolina gives below the proceedings in this case without any comment on the merits, which is reserved for argument, as follows:

(1) The Petitioner, Larry Dayton Hudson, along with Ray Starling and David Cain, was charged with larceny from the person, and upon preliminary hearing, held February 25, 1958, in the Recorder's Court of Cumberland County, the Petitioner and the other defendants were held for trial in the Superior Court of Cumberland County, which is a Court of general jurisdiction. The record is silent as to whether the Petitioner and the other defendants were able to furnish bond in the amount of $200.00 required for their appearance in the Superior Court.

(2) In the Superior Court the Petitioner and the other defendants were indicted by the Grand Jury upon a charge of robbery from the person (R. 3). The Petitioner and the other defendants were placed on trial on March 13, 1958, and before the trial opened the Petitioner stated that he had no funds with which to employ an attorney, that he was not capable of defending himself and that he would like for the Court to employ an attorney for him (R. 4). The prosecuting officer admitted that the Petitioner was not financially able to employ an attorney and also said that he did not know whether the Petitioner was able to represent himself or not (R. 4). The Court stated to the Petitioner that he (the Court) would see that his rights were protected throughout the case (R. 4). Petitioner's co-defendant, David Cain, obtained counsel of his own choosing and was represented by such counsel. Petitioner's co-defendant, Ray Starling, was not represented by counsel.

(3) Counsel for David Cain stated that all three defendants might be represented by him as long as their interests did not conflict (R. 6). Thereafter it appeared that there was a conflict of interest (R. 11), and the Court stated to counsel for David Cain that he should examine a witness for his own client, and the Court thereafter questioned the witness to some extent (R. 11).

(4) At the close of the evidence for the State counsel for David Cain tendered a plea of guilty of larceny "in such amount that it is a misdemeanor", and this was accepted by the State. The trial proceeded, and the Petitioner and Ray Starling were convicted of larceny from the person (R. 54). The Petitioner and Ray Starling received sentences as appears on R. 55. David Cain was sentenced for a period of six months but the sentence was suspended, and he was placed on probation for a period of five years under the supervision of the North Carolina Probation Commission.

(5) Thereafter the Petitioner, Larry Dayton Hudson, gave notice of appeal to the Supreme Court of North Carolina (R. 56). The Petitioner was allowed to enter his appeal and perfect it to the Supreme Court of North Carolina if he so desired (R. 57). The Petitioner did not perfect the appeal and it was adjudged to be abandoned, as shown on R. 58.

(6) Thereafter the Petitioner filed a Petition for Writ of Certiorari in the Superior Court of Cumberland County which was treated as an application, or petition, under the North Carolina Post-Conviction Hearing Act. The Petition for Writ of Certiorari appears on R. 59, and this proceeding was duly heard by the Superior Court who appointed counsel to represent the Petitioner. The Superior Court upon this hearing made Findings of Fact and signed an order dismissing the petition, which appears on R. 61, 62, 63, 64.

(7) Thereafter the Petitioner filed a Petition for Writ of Certiorari in the Supreme Court of North Carolina seeking a review of this Post-Conviction proceeding, and this petition, or application, was denied by the Supreme Court of North Carolina, as shown on R. 64.

SUMMARY OF ARGUMENT

The State of North Carolina does not deny that the Petitioner was indicted for the offense of common law robbery, that this offense is a felony, and that it can be punishable, if infamous, by a prison sentence of as much as ten years. The Petitioner was convicted of larceny of the person, which is also a felony punishable by as much as ten years as a maximum.

The State of North Carolina will argue that there is no question for this Court to consider under the State Constitution and State Statutes as to appointment of counsel. It is believed that the rules of the State of North Carolina in this respect are substantially in accord with the Federal rules (STATE v. HEDGEBETH, 228 N. C. 259, 45 S. E. 2d 563, cert. dismissed, 334 U. S. 806, 92 L. ed. 1739, 68 S. Ct. 1185; IN RE TAYLOR, 229 N. C. 297, 49 S. E. 2d 749).

The State of North Carolina will argue that the line of decisions of this Court dealing with the appointment of counsel in capital cases, or in cases dealing with life imprisonment, is not applicable to this case at all and that these cases (TOMPKINS v. MISSOURI, 323 U. S. 485, 89 L. ed. 407, 65 S. Ct. 370; POWELL v. ALABAMA, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55) represent the same doctrine as that held by the North Carolina Supreme Court in capital cases.

It will be argued by the State of North Carolina that this case falls within the reasoning and rules decided by this Court in BETTS v. BRADY, 316 U. S. 455, 86 L. ed. 1595, 62 S. Ct. 1252; FOSTER v. ILLINOIS, 332 U. S. 134, 91 L. ed. 1955, 67 S. Ct. 1716; GIBBS v. BURKE, 337 U. S. 773, 93 L. ed. 1687, 69 S. Ct. 1247. It will further be argued that the reasoning of this Court in UVAGES v. PENNSYLVANIA, 335 U. S. 437, 93 L. ed. 127, 69 S. Ct. 184, shows that this case falls within the second classification in the opinion where the Court will make an evaluation of the gravity of the crime, the age and education of the Defendant, the conduct of the Court, and then determine whether the failure to appoint c o u n s e l

amounts to fundamental unfairness prohibited by the Fourteenth Amendment.

It will further be argued by the State of North Carolina that a review of the record in this case will show that there was no unfairness in the trial, the evidence as to the commission of the offense was direct and simple, that no incompetent evidence was introduced against the Petitioner and that the record shows that the Petitioner handled his own case well and was protected not only by the Court but also to a large extent by the attorney who represented the Petitioner's co-defendant, David Cain.

Last of all, the State of North Carolina contends that the fact that some persons can obtain counsel by their own finances does not result in any violation of equal protection of the laws from the simple fact that an indigent defendant is not given counsel, plus the fact that no unfairness resulted against him in the trial.

ARGUMENT

A

THE CONSTITUTION AND STATUTES OF NORTH CAROLINA HAVE NO APPLICATION IN THIS CASE.

The position of the State of North Carolina on appointment of counsel is clearly stated in STATE v. HEDGEBETH, 228 N. C. 259, 45 S. E. 2d 563. In this case it is said:

> "In capital felonies these provisions relative to counsel are regarded as not merely permissive but mandatory. This is indicated by the statute, G. S. 15-5, and by numerous decisions of this Court. S. v. COLLINS, 70 N. C. 242; S. v. JACOBS, 107 N. C. 772, 11 S. E. 962; S. v. HARDY, 189 N. C. 799, 128 S. E. 152; S. v. WHITFIELD, 206 N. C. 696, 175 S. E. 93; S. v. FARRELL, 223 N. C. 321, 26 S. E. 2d 322; POWELL v. ALABAMA, 287 U. S. 45. But in cases of misdemeanors and felonies less than capital it has been the uniform practice in this jurisdic-

tion to regard these provisions as guaranteeing the right of persons accused to have counsel for their defense, to be represented by counsel, and the right to have counsel assigned if requested and the circumstances are such, for financial or other reasons, as to show the apparent necessity of counsel for the protection of the defendant's right.

"But we cannot hold that in all cases, in the absence of any present statute to that effect, the burden is imposed upon the state to provide counsel for defendants. In cases less than capital the propriety of providing counsel for the accused must depend upon the circumstances of the individual case, within the sound discretion of the trial judge. In the language of JUSTICE HOLMES in LOCKNER v. NEW YORK, 198 U. S. 45, 'General propositions do not decide concrete cases.'"

The Supreme Court of North Carolina denied certiorari (R. 64), and although no opinion was written it would appear that this is determinative of any question raised under the State Constitution and Statutes.

B

THE TRIAL OF THE PETITIONER, UNDER THE CIRCUMSTANCES IN THIS CASE, WITHOUT COUNSEL, DID NOT RESULT IN ANY FUNDAMENTAL UNFAIRNESS PROHIBITED BY THE FOURTEENTH AMENDMENT.

For the purposes of this argument the State of North Carolina admits that the Petitioner requested the Court to appoint an attorney for him and that it was admitted by one of the prosecuting officers that the Petitioner was not able financially to employ an attorney. Furthermore, the State of North Carolina does not contend that there has been any waiver on the part of the Petitioner in this case, and if Petitioner was entitled to the assistance of counsel, under the facts and circumstances of this case, no contention is made that he waived that right.

The State of North Carolina puts to one side a group of

cases cited by Petitioner dealing either with capital offenses or with felony charges that are highly complex and technical in nature. Many of the cases cited by the Petitioner do not deal with the appointment or assistance of counsel at all. For example, in BURNS v. OHIO, 360 U. S. 252, 3 L. ed. 2d. 1209, 79 S. Ct. 1164, the defendant had been convicted of burglary and sentenced to life imprisonment. He was required by Ohio law to pay a filing fee before permitting him to file a motion for leave to appeal. This Court held that an indigent defendant could not be deprived of his right to appeal because he could not pay the filing fee and that indigents should have the same right in this field as other persons.

In CHESSMAN v. TEETS, 350 U. S. 3, 100 L. ed. 4, 76 S. Ct. 34, the Petitioner in his allegations for a writ of habeas corpus alleged that his appeal to the California Supreme Court from a capital conviction had been heard upon a fraudulently prepared transcript of the trial proceedings. The official court reporter had died before completing the transcription and the Petitioner alleges that the prosecuting attorney and the substitute reporter had by corrupt arrangements prepared the fraudulent transcript. This Court held that upon these allegations the Petitioner should have been heard. There is no question or problem of the assistance of counsel in this phase of the Chessman Case.

In CHANDLER v. FRETAG, 348 U. S. 3, 99 L. ed. 4, 75 S. Ct. 1, the Petitioner was indicted for housebreaking and larceny, and when he appeared in Court, intending to plead guilty, he was advised that this would be a fourth offense and that he would be tried as an habitual criminal and that conviction carried a mandatory sentence of life imprisonment with no possibility of parole. The Petitioner requested a continuance to enable him to obtain counsel on the habitual criminal charge, and this was denied; the Petitioner was put to trial and convicted. This Court said that the Petitioner should have had counsel on the habitual criminal accusation, and, furthermore, this Court said that the Petitioner had not asked for counsel to be appointed but wanted to be assisted by his own counsel and that the Petitioner's right to be heard through his own counsel was unqualified.

In ESKRIDGE v. WASHINGTON STATE BOARD, 357 U. S. 214, 2 L. ed. 2d 1269, 78 S. Ct. 1061, this Court held that the Petitioner was entitled to a transcrpit of the trial proceedings for his appeal and that this could not be denied by the State of Washington because the Petitioner was indigent and that the case was controlled by the Griffin Case.

In DE MEERLEER v. MICHIGAN, 329 U. S. 663, 91 L. ed. 584, 67 S. Ct. 596, the Petitioner, 17-years of age, was charged with murder and on the same day of the indictment was arraigned, tried, convicted and sentenced to life imprisonment. He had no counsel and was never advised of his right to counsel. This Court said that he should have had counsel because he was totally unfamiliar with legal proceedings and he was never told of the consequences of his plea.

In HAWK v. OLSON, 326 U. S. 271, 90 L. ed. 61, the defendant had been convicted of murder and had no advice of counsel prior to the calling of the jury. The case shows that the defendant had been deprived of the effective assistance of counsel and there was an allegation that the conviction was obtained by the use of perjured testimony knowingly used by the prosecuting officials and the trial court. These allegations were taken as true for the purposes of the hearing and it was held that the defendant had stated a cause of action showing deprivation of the assistance of counsel.

In PENNSYLVANIA v. CLAUDY, 350 U. S. 116, 100 L. ed. 126, 76 S. Ct. 223, the Petitioner had pleaded guilty to 30 charges involving various offenses and had been sentenced to serve 17-1/2 to 35 years. The Petitioner was 21-years old and had been to school six years and his only experience with criminal procedure was a plea of guilty to charges of burglary, larceny and forgery. It also appears that after Petitioner's arrest he was held for three days and threatened if he did not confess and that there were threats against the safety of his wife and daughter. The Petitioner finally confessed after 72-hours of intermittent questioning. This Court said that the number and complexity of the charges, as well as their seriousness, were such that no layman could have un-

derstood the accusations, and, therefore, the Petitioner should have been advised of his right to be represented by counsel.

In POWELL v. ALABAMA, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, the defendant was unable to employ counsel in a capital case and was a feeble-minded illiterate. It was the duty, therefore, of the Court to appoint counsel. This Court further said that there had been no effective appointment of counsel.

In REESE v. GEORGIA, 350 U. S. 85, 100 L. ed. 77, 76 S. Ct. 167, the Petitioner was a semi-illiterate Negro indicted on a capital charge. He was appointed counsel but not in time to take advantage of a challenge of the organization of the Grand Jury which under Georgia procedure he should have objected to before the indictments were found. It will thus be seen that the Petitioner did not have counsel in time to make the necessary objections to the composition of the Grand Jury and that appointment of counsel in this capital case was not timely or effective.

In TOMPKINS v. MISSOURI, 323 U. S. 485, 89 L. ed. 407, 65 S. Ct. 370, the Petitioner pleaded guilty to first degree murder and received a life sentence. He was ignorant of his right to demand counsel, and he needed counsel because under Missouri Law one charged with murder in the first degree may also be found guilty of murder in the second degree, or manslaughter, and, therefore, the defenses covered a wide range and the differences between the degrees of crime are technical.

In WILLIAMS v. KAISER, 323 U. S. 471, 89 L. ed. 398, 65 S. Ct. 363, the Petitioner pleaded guilty to robbery by means of a deadly weapon. This was a capital offense in Missouri, and the Petitioner asked for counsel; the request was not granted although Missouri Law seemed to require the appointment of counsel for a person unable to employ one and who is charged with a felony. Since this was a capital charge we have no further comment.

In TOWNSEND v. BURKE, 334 U. S. 736, the Petitioner

was indicted for burglary and armed robbery. He was held incommunicado for a period of 40-hours between his arrest and his plea of guilty. He was not offered counsel, advised of his right to counsel or instructed as to the nature of the crime against him. He had been found not guilty on two other charges, and the Court in sentencing the Petitioner acted on certain assumptions concerning his criminal record which were materially untrue. In this case the Petitioner clearly needed counsel.

The case of WOLF v. COLORADO, 338 U. S. 25, 93 L. ed. 1782, 69 S. Ct. 1359, has nothing to do with the appointment of counsel at all but deals with unreasonable searches and seizures. Likewise, CHAMBERS v. FLORIDA, 309 U. S. 227, 84 L. ed. 716, 60 S. Ct. 472, deals with the subject of an involuntary confession, and YICK WO v. HOPKINS, 118 U. S. 356, deals with the constitutionality of a city ordinance which discriminated against Chinese laundries operated in wooden buildings.

This is a summary of the cases cited by the Petitioner, and with one exception, which will be discussed later, it is submitted that they arise under circumstances totally dissimilar to the case the Court is now considering. Many of these cases come before this Court upon allegations in petitions for writs of habeas corpus, and this Court in some instances has said that it expresses no opinion on what may be developed at the actual hearing. An examination of the cases will show that many are capital cases and are not relevant to this inquiry. Many arise upon multiple charges of complex and technical crimes, and some are aggravated cases in which the petitioners were held incommunicado or involuntary confessions were extorted from them.

The State of North Carolina relies upon the principles decided by this Court in BETTS v. BRADY, 316 U. S. 455, 86 L. ed. 1595, 62 S. Ct. 1252, and as affirmed by this Court in the case of FOSTER v. ILLINOIS, 332 U. S. 134, 91 L. ed. 1955, 67 S. Ct. 1716. We will not quote from these opinions but they do conclude that in the great majority of the states the people,

their representatives and their courts do not consider the appointment of counsel a fundamental right essential to a fair trial in all cases. It is pointed out that to require the appointment of counsel in all cases of criminal charges of different magnitude would lead to the appointment of counsel in small crimes before justices of the peace, equally with capital charges, and even in a traffic court, and that there is no logical reason why this would not extend to civil cases involving property, for the Fourteenth Amendment protects property as well as life and liberty. It is also pointed out in these cases that constitutional provisions to the effect that a defendant should be allowed counsel were intended to do away with the rules which denied representation, in whole or in part, by counsel in criminal prosecutions but were not designed to compel the State to provide counsel in all cases.

The circumstances of this case do not show that the failure to appoint counsel for the Petitioner, Larry Hudson, resulted in any fundamental unfairness. Counsel for the Petitioner has spent much time in the fact that the Court did not appoint counsel, the youth of the Petitioner, the educational status of the Petitioner and various factors which are contained in cases in this Court, but he has spent very little time in pointing out the exact details of unfairness, if any, which existed in this trial. We summarize the trial, as follows:

(1) The Petitioner was indicted upon a charge of common law robbery (R 3) and was convicted on a charge of larceny from the person (R 54).

(2) The Petitioner at this time was 18-years of age and had reached the sixth grade in the public schools, and, as found by the Judge in the hearing on the Post-Conviction Act "He is intelligent, well-informed, and was familiar with and experienced in court procedure and criminal trials, having been previously tried on different occasions for careless and reckless driving, for breaking and entering, for driving while under the influence of intoxicating liquor, and for assault and robbery, the last two cases being tried at the February, 1958, Term of the Superior Court, and the Petitioner not

being represented by counsel in these two cases. The Petitioner, conducting his own defense, was acquitted of said assault and robbery charge tried at the said 1958 Term."

(3) The record in the Post-Conviction Hearing having not been certified to this Court by Petitioner, there is a presumption of regularity and correctness as to the findings of the trial judge (HENDRICKS v. U. S., 219 U. S. 79, 88, 55 L. ed. 102; BOLEY v. GRISWOLD, 87 U. S. 486, 487, 488, 22 L. ed. 375; CUNNINGHAM v. SPRINGER, 204 U. S. 647, 657, 51 L. ed. 662).

(4) The charge against the Petitioner was simple, without complexities and technicalities, and it was simply a question of whether the Petitioner took the prosecuting witness' billfold and the money contained therein in a felonious manner. The prosecuting witness, Mr. G. W. Spell, testified that the Petitioner did take his money and billfold (R. 4-26). The Petitioner testified in his own behalf (R. 40-44) and denied all the material evidence of the State and testified that the billfold was found in the car, with nothing in it, and that his co-defendant, Starling, who found the billfold in the car, threw it out of the car and said there was nothing in it. The case, therefore, was a simple, direct issue before the jury and was largely resolved by the credibility of the witnesses or, in other words, the finding of the jury as to who told the truth.

(5) The Petitioner did ask for counsel, and it was admitted by one of the attorneys for the State that he was not able to employ an attorney of his own and the Court said that it would see that the Petitioner's rights were protected, and an examination of the transcript shows that the Court did just that.

(6) The Petitioner had the benefit of the representation of counsel who appeared for David Cain until there was an apparent conflict, which is shown on R. 11. Therefore, the Court examined the witnesses for the Petitioner except at such times as the Petitioner desired to cross-examine.

(7) The Petitioner had the benefit of a lengthy and search-

ing cross-examination of the prosecuting witness by the attorney who appeared for his co-defendant, David Cain (R. 13-23).

(8) The Court was careful to see that no incompetent evidence was admitted against the Petitioner, as will be shown on R. 7, 26, 27, 29, 30, 33.

(9) There is no evidence whatsoever that the Petitioner was denied compulsory process for witnesses, that the State withheld any evidence or that any perjured testimony was used. Likewise, there is no evidence whatsoever that the Petitioner was ignorant or feeble-minded, but, to the contrary, everything shows that he was extremely intelligent and mentally alert. The cross-examination conducted by the Petitioner, as shown on R. 23, 24, 25, as well as his objections to evidence, as shown on R. 30, 33, and perhaps other places, all show that the Petitioner was familiar with criminal procedure and evidence.

(10) There is no evidence whatsoever that there were any witnesses who could establish an alibi for Petitioner, but, to the contrary, the Petitioner in his own evidence (R. 40) testified that he was with the prosecuting witness in the automobile.

(11) There is no evidence whatsoever or any suggestion that the Petitioner was not present when the crime was committed or that the crime was committed by other persons with whom the Petitioner had no connection.

(12) The instructions of the Court to the jury were full and ample and Petitioner cannot complain that anything fundamentally unfair was inflicted upon him during this trial. The Petitioner was simply convicted of a simple offense, which is a felony, and he does not like his punishment.

The burden is on the Petitioner to show that his constitutional rights have been violated (BUCHALTER v. NEW YORK, 319 U. S. 427, 431, 87 L. ed. 1492, 1496; ADAMS v. UNITED STATES, 317 U. S. 269, 281, 87 L. ed. 268, 275).

The Petitioner relies upon WADE v. MAYO, 334 U. S. 672, 92 L. ed. 1647, 68 S. Ct. 1270 but it is apparent that this is a habeas corpus proceeding and the Court decided that it was proper to entertain the petition upon the petitioner's own allegations. As to the failure to appoint counsel for Wade, this Court based its decision upon the findings and conclusions of the District Court as a factual matter and as being a judgment peculiarly within the province of the judge who passed upon the facts and who had personal observation of Wade. This Court said in substance that some individuals because of age, ignorance or mental capacity cannot adequately represent themselves in a simple prosecution and that "this incapacity is purely personal and can be determined only by an examination and observation of the individual."

We would point out that in the case of STATE v. HEDGEBETH, 228 N. C. 259, 45 S. E. 2d 563, the Petitioner was a tenant farmer, 24-years of age, and had not been beyond the third grade in school. He was of average mentality but was ignorant and unacquainted with business or legal affairs; he had not been arrested before and was inexperienced in court procedure. The Supreme Court of North Carolina held that it was not necessary to appoint counsel, and this Court dismissed the petition for certiorari after the case was argued before it (HEDGEBETH v. NORTH CAROLINA, 334 U. S. 806, 92 L. ed. 1739, 68 S. Ct. 1185.) This Court based its dismissal on a nonfederal ground because the full record was not before the Supreme Court. Likewise, it is apparent from this transcript that the full record was not before the Supreme Court of North Carolina on the Post-Conviction Hearing Act, and the denial of certiorari (R. 64) is based upon the Post-Conviction Hearing.

C

THE DENIAL OF CERTIORARI IN THE SUPREME COURT OF NORTH CAROLINA COULD REST UPON A NONFEDERAL GROUND.

The Petitioner in this case did not perfect his appeal to the Supreme Court of North Carolina. He could have raised the

question of failure to appoint counsel upon request by means of an appeal (STATE v. GIBSON, 229 N. C. 497, 50 S. E. 2d 520; STATE v. WAGSTAFF, 235 N. C. 69, 68 S. E. 2d 858).

The North Carolina Post-Conviction Hearing Act cannot be used as a substitute for an appeal or to raise legal questions that could have been raised by an appeal (STATE v. CRUSE, 238 N. C. 53, 76 S. E. 2d 320; MILLER v. STATE, 237 N. C. 29, 74 S. E. 2d 513). The Petitioner had a full and adequate remedy under North Carolina practice by the use of the writ of error coram nobis (IN RE TAYLOR, 230 N. C. 566, 53 S. E. 2d 857). The denial of certiorari, therefore, by the Supreme Court of North Carolina can rest upon an adequate nonfederal ground.

D

THERE IS NO QUESTION PRESENTED AS TO EQUAL PROTECTION OF THE LAWS.

Last of all, Petitioner insists that because counsel was not appointed for him, and that other defendants can have counsel if they have adequate means, constitutes a violation of equal protection of the laws. It is evident from the Brief of Counsel for the Petitioner and the citations on Legal Aid and Public Defenders that Counsel is contending that the Fourteenth Amendment requires that counsel shall be appointed in all cases and that this is a bid for this Court to overrule BETTS v. BRADY, supra. The Petitioner relies upon GRIFFIN v. ILLINOIS, 351 U. S. 12, 76 S. Ct. 585, and cases that stem from that decision. We submit that there is a vast difference between foreclosing an appeal for lack of money and the appointment of counsel. North Carolina provides for pauper appeals, and what the Petitioner is asking is that first the Court hold that counsel must be appointed in all felony cases, and then counsel makes a bid for public offenders by asking that the Court in essence appoint counsel in all cases. It is submitted that if this had been a violation of equal protection of the laws, then this Court would have so held long ago, and the cases of BETTS v. BRADY, supra, and FOSTER v. ILLINOIS, supra, would have set forth different principles and different conclusions.

CONCLUSION

The State of North Carolina submits that no fundamental unfairness resulted to the Petitioner because of failure to appoint counsel in this case. On the contrary, the trial judge was zealous to protect the Petitioner at all stages of the trial. We ask this Court to uphold the principle given in FOSTER v. ILLINOIS, supra, when it said:

> "After all, due process, 'itself a historical product,' JACKMAN v. ROSENBAUM CO., 260 U. S. 22, 31, 67 L. ed. 107, 112, 43 S. Ct. 9, is not to be turned into a destructive dogma in the administration of systems of criminal justice under which the States have lived not only before the Fourteenth Amendment but for the eighty years since its adoption. It does not militate against respect for the deeply rooted systems of criminal justice in the States that such an abrupt innovation as recognition of the constitutional claim here made implies, would furnish opportunities hitherto uncontemplated for opening wide the prison doors of the land."

The State of North Carolina, therefore, asks this Court to dismiss this Petition and if the Petition is not dismissed we ask the Court to hold that under the circumstances of this case the constitutional rights of Petitioner, as guaranteed by the Fourteenth Amendment, have not been violated.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 466.—October Term, 1959.

Larry Dayton Hudson, Petitioner, v. State of North Carolina. | On Writ of Certiorari to the Supreme Court of North Carolina.

[June 20, 1960.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioner and two others were brought to trial before a jury in the Superior Court of Cumberland County, North Carolina, upon an indictment jointly charging them with robbery. When their case was called one of the defendants, David Cain, was represented by a lawyer of his own selection. The petitioner and the other defendant did not have counsel. Before pleading to the indictment, the petitioner, who was eighteen years old, asked the presiding judge to appoint a lawyer to help him with his defense, stating that he was without funds to employ counsel and was incapable of defending himself.[1] The prosecutor conceded that the petitioner was unable to employ an attorney.[2] The trial judge denied the motion, telling the petitioner that "the Court will try to see that your rights are protected throughout the case."

All three of the defendants thereupon pleaded not guilty, and the case proceeded immediately to trial. The first witness for the State was the alleged victim of the robbery. Midway through this witness's testimony

[1] "I don't have funds to employ an attorney and I am not capable of defending myself. If the Court please, I would like to ask the Court to employ me an attorney."

[2] "I will say that he is not able to employ an attorney but as to whether he is able to represent himself I cannot say."

Cain's lawyer offered to represent all three codefendants "as long as their interests don't conflict." At the conclusion of the witness's direct testimony the trial judge advised the lawyer that he should cross-examine only on behalf of Cain, because "I think you probably have a conflicting interest there." Thereafter the witness was cross-examined intensely by Cain's lawyer, who brought out the witness's criminal record and previous commitment to a state mental institution. The petitioner and the other codefendant also briefly cross-examined the witness. The only other witnesses for the prosecution were two deputy sheriffs, who testified as to statements made to them by the defendants. They were cross-examined by the lawyer, but not by the two defendants without counsel.

At the conclusion of the State's evidence, Cain's lawyer moved that the case be dismissed. When this motion was denied he stated that Cain had no evidence to offer. Thereupon, in the presence of the jury, he tendered on behalf of Cain a plea of guilty to petit larceny. This plea was agreed to by the prosecutor and accepted by the court. The lawyer then withdrew from the proceedings.

The trial proceeded. The petitioner and his remaining codefendant each took the stand. Each made a statement denying the robbery. The petitioner was cross-examined at some length, with emphasis upon his previous criminal record. Neither the petitioner nor his codefendant produced any other witnesses or offered any further evidence. They were given an opportunity to argue their case to the jury, but did not do so.

The jury found both defendants guilty of larceny from the person, a felony under North Carolina law, and the following day the trial judge pronounced sentence. The petitioner was committed to the penitentiary for a term of three to five years. The codefendant convicted with him was sentenced to a jail term of eighteen months to

two years. Cain was given a six months' suspended sentence.

The petitioner's subsequent appeal to the Supreme Court of North Carolina was dismissed for want of prosecution. Thereafter he filed in the trial court a "petition for writ of certiorari," which urged that the failure of the trial court to provide him with counsel had deprived him of his constitutional rights. This petition was treated as an application for relief under the North Carolina Post-Conviction Hearing Act.[3] In the subsequent proceedings the court appointed a lawyer to represent the petitioner,[4] and held a hearing at which the petitioner and his counsel were present. After considering the evidence presented, including a transcript of the trial proceedings,[5] the court concluded that no special circumstances were shown which required the appointment of trial counsel, that the petitioner had been convicted only after a fair and impartial trial, and that there had con-

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[3] N. C. Gen. Stat., § 15–217 *et seq.*

[4] The North Carolina Post-Conviction Hearing Act provides: "If the petition alleges that the petitioner is without funds to pay the costs of the proceeding, and is unable to give a costs bond with sureties for the payment of the costs for the proceeding and is unable to furnish security for costs by means of a mortgage or lien upon property to secure the costs, the court may order that the petitioner be permitted to proceed to prosecute such proceeding without providing for the payment of costs. If the petitioner is without counsel and alleges in the petition that he is without means of any nature sufficient to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested, the court shall appoint counsel if satisfied that the petitioner has no means sufficient to procure counsel. The court shall fix the compensation to be paid such counsel which, when so determined, shall be paid by the county in which the conviction occurred." N. C. Gen. Stat., § 15–219.

[5] The judge who conducted the post-conviction proceedings was not the judge who had presided at the trial.

sequently been no denial of due process of law. The petition was accordingly dismissed.* The Supreme Court of North Carolina declined to review the order of dismissal. We granted certiorari to consider the substantial constitutional claim asserted. 361 U. S. 812.

The judge who presided at the post-conviction proceedings made detailed findings of fact. He found that the trial judge had "advised the petitioner of his right to challenge when the jury was selected and advised the petitioner of his right to cross examine witnesses and to argue the case to the jury." He also found that "during the trial the Court properly excluded evidence which was inadmissible, and the petitioner cross examined the witnesses against him and at his request testified in his own behalf."

In this Court counsel for the petitioner does not take issue with these findings. Counsel's primary emphasis rather is upon the petitioner's comparative youth, relying upon *Wade* v. *Mayo*, 334 U. S. 672. In that case it was held that the denial of a lawyer's help had resulted in the deprivation of due process where the Federal District Court after a habeas corpus hearing had found that the eighteen-year-old defendant was "an inexperienced youth unfamiliar with Court procedure, and not capable of adequately representing himself." 334 U. S., at 683. Here, by contrast, the post-conviction court found that "although the petitioner was only eighteen years of age and had been only to the sixth grade in school at the time

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* The dismissal was clearly based upon the court's view of the merits of the petitioner's constitutional claim. The court nowhere suggested that the petitioner had chosen an inappropriate remedy under the State law. Indeed the Supreme Court of North Carolina has made clear that claims of unconstitutional denial of the right to counsel are to be considered on their merits in Post-Conviction Hearing Act proceedings. *State* v. *Hackney*, 240 N. C. 230, 81 S. E. 2d 778; *State* v. *Cruse*, 238 N. C. 53, 76 S. E. 2d 320.

of his trial, he is intelligent, well-informed, and was familiar with and experienced in Court procedure and criminal trials . . . ." Evaluations of this nature are peculiarly within the province of the trier of the facts based upon personal observation. As the Court pointed out in *Wade* v. *Mayo*, "[t]here are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simply nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual." 334 U. S., at 684.

In view of the findings of the post-conviction court, supported by the record of the trial proceedings, this, in short, is not a case where it can be said that the failure to appoint counsel for the defendant resulted in a constitutionally unfair trial either because of deliberate overreaching by court or prosecutor or simply because of the defendant's chronological age. Moreover, the record shows that up to the time that Cain's lawyer withdrew from the proceedings the petitioner was receiving the effective benefit of the lawyer's activity, and had the trial of all three defendants proceeded to a jury verdict, it is possible that the lawyer could have continued to represent the interests of the petitioner as well as those of the client who had retained him.

But that did not happen. Instead, on the advice of his counsel Cain entered a plea of guilt in the presence of the jury midway through the trial. The potential prejudice of such an occurrence is obvious and has long been recognized by the courts of North Carolina. *State* v. *Hunter*, 94 N. C. 829, 835; *State* v. *Bryant*, 236 N. C. 745, 747, 73 S. E. 2d 791, 792; *State* v. *Kerley*, 246 N. C. 157, 97 S. E. 2d 876. Yet it was precisely at this moment of great potential prejudice that the petitioner and his codefendant were left entirely to their own devices, for it was then that Cain's lawyer withdrew from the case. At

that very point the petitioner and his codefendant were left to go it alone.

The precise course to be followed by a North Carolina trial court in order to cure the prejudice that may result from a codefendant's guilty plea does not appear to have been made entirely clear by the North Carolina decisions. In the *Hunter* case the Supreme Court of North Carolina pointed out that while not infrequently a defendant on trial with another is allowed to enter a plea of guilt during the course of the trial, the court should exercise care "to see that such practice works no undue prejudice to another party on trial." 94 N. C., at 835. Later cases have been somewhat more explicit. In the *Bryant* case curative instructions to the jury given immediately after a codefendant's guilty plea were held sufficient to avoid error prejudicial to the remaining defendant. 236 N. C., at 747–748, 73 S. E. 2d, at 792. More recently, in the *Kerley* case, the court said that "[w]hen request therefor is made, it is the duty of the trial judge to instruct the jury that a codefendant's plea of guilty is not to be considered as evidence bearing upon the guilt of the defendant then on trial and that the latter's guilt must be determined solely on the basis of the evidence *against him* and without reference to the codefendant's plea." 246 N. C., at 161; 97 S. E. 2d, at 879. Indeed, the court expressed the view that even "a positive instruction probably would not have removed entirely the subtle prejudice that unavoidably resulted from [a codefendant's] plea. . . ." 246 N. C., at 162; 97 S. E. 2d, at 880.

In the present case the petitioner did not make any request that the jury be instructed to disregard Cain's guilty plea, and the court gave none, either at the time the plea was entered or in finally instructing the jury. A layman would hardly be aware of the fact that he was entitled to any protection from the prejudicial effect of a codefendant's plea of guilt. Even less could he

be expected to know the proper course to follow in order to invoke such protection. The very uncertainty of the North Carolina law in this respect serves to underline the petitioner's need for counsel to advise him.

The post-conviction court made no finding specifically evaluating the prejudicial effect of Cain's plea of guilt and the trial judge's subsequent failure to give cautionary instructions to the jury. In any event, we cannot escape the responsibility of making our own examination of the record. *Spano* v. *New York*, 360 U. S. 315, 316. We hold that the circumstances which thus arose during the course of the petitioner's trial made this a case where the denial of counsel's assistance operated to deprive the defendant of the due process of law guaranteed by the Fourteenth Amendment. The prejudicial position in which the petitioner found himself when his codefendant pleaded guilty before the jury raised problems requiring professional knowledge and experience beyond a layman's ken. *Gibbs* v. *Burke*, 337 U. S. 773; *Cash* v. *Culver*, 358 U. S. 633.

Reversed.

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Mr. Justice Clark, whom Mr. Justice Whittaker joins, dissenting.

The opinion of the Court bids fair to "furnish opportunities hitherto uncontemplated for opening wide the prison doors of the land." *Foster* v. *Illinois*, 332 U. S. 134, 139 (1947). Without so much as mentioning *Betts* v. *Brady*, 316 U. S. 455 (1942), it cuts serious inroads into that holding and releases petitioner, now a fourth offender though only 18 years old, from his 3-to-5-year sentence for larceny from the person. The Court does so on the ground of a single circumstance occurring at the trial, *i. e.*, the fact that a codefendant, David Cain, was permitted at the close of the State's case to plead guilty to "larceny, in such amount that it is a misdemeanor." The Court says that this circumstance "made this a case where the denial of counsel's assistance operated to deprive the defendant of the due process of law guaranteed by the Fourteenth Amendment." Strangely enough, the Court digs up this ground *sua sponte*, for neither the petitioner, the State, nor any court of North Carolina thought such circumstance produced sufficient "unfairness" in the trial even to discuss it, though its existence was mentioned in the recital of facts in petitioner's brief. The truth is that the courts of North Carolina have held affirmatively that petitioner received a fair trial, and that no special circum-

stances were shown to indicate that lack of counsel resulted in prejudice to petitioner.

The Court, however, speculates that Cain's change in plea "raised problems requiring professional knowledge and experience beyond a layman's ken." The Court says that "[T]he prejudicial position in which the petitioner found himself" resulted. But this is purely speculative and, I submit, does not at all follow. In fact, the jury—despite language in the court's charge which indicated the presence of "violence, intimidation and putting [the victim] in fear"—refused to find petitioner guilty of the common-law offense of robbery but only found him guilty of the lesser offense, larceny from the person. The record here would clearly support a verdict of guilty on the robbery charge. As I appraise the jury's verdict, it would be much more realistic to say that David Cain's plea of guilty influenced the jury not to find petitioner guilty of the greater offense. After all, Cain was only the driver of the car and participated no further in the criminal enterprise. In fact the victim could not even identify him at the trial. Cain, unlike petitioner, had "wholeheartedly admitted" his guilt to the officers. This apparently brought on his plea. Petitioner on the other hand was the chief actor in the criminal enterprise. In addition, he had a criminal record, had served a term in prison, was twice an escapee therefrom, and from the record here gives every appearance of being a hardened criminal. Still the jury found him guilty only of the lesser offense, larceny from the person. It is reasonable to assume that it did this because Cain was permitted to plead to the lesser offense of larceny.

The Court cites three North Carolina cases* in support of the "potential prejudice" which it finds petitioner may

State v. Hunter, 94 N. C. 829, 835; *State v. Bryant*, 236 N. C. 745, 747, 73 S. E. 2d 791, 792; *State v. Kerley*, 246 N. C. 157, 97 S. E. 2d 876.

have suffered from Cain's change of plea. None of these cases were cited by the parties. As I have said, the point was not raised in the briefs. But even the North Carolina cases cited by the Court do not support its new theory for reversal. All they indicate, as the Court frankly points out, is that care must be exercised to avoid "undue prejudice." In this regard the trial court fully protected petitioner all during the presentation of the case and gave a full, fair, and intelligent charge to which no objection is even now being made by petitioner. It is intimated by the Court that North Carolina law required a charge that Cain's plea not be considered as any evidence bearing on petitioner's guilt. But the short answer is that three North Carolina courts have considered this case and not one has even mentioned the point. The Court says this underlines the petitioner's need for counsel. I submit that he has had counsel since his Post Conviction Hearing Act case was filed some two years ago, and not once has the handling of the Cain plea been urged as error necessitating reversal.

While I do not wish to labor the issue, I must say that careful study of the case convinces me that it was a simple one and the trial was without complexity or technicality. The petitioner and three others induced their victim, an elderly man, to enter their car on the ruse that they would take him home for a dollar. It was in the nighttime and on the way to his home they drove into some woods. Petitioner ordered the victim out of the car, directed him to hold up his hands, and then went through his pockets, taking his billfold, containing some $24. The sole question for the jury was one of fact, namely, did petitioner take the old man's money? The State offered three witnesses in support of its position. The petitioner and his codefendant took the stand and gave their version of the affair, each admitting his presence on the scene but denying any robbery. There is not and never has been any

claim that the State withheld any evidence or used perjured testimony or that incompetent evidence was admitted against the petitioner; or that he was denied compulsory process for witnesses; or that he was ignorant or feeble-minded, or that the instructions of the court were not full and sufficient. As the Court itself finds, this "is not a case" where the age of the defendant or the deliberate "overreaching by court or prosecutor" resulted in an "unfair trial." Moreover, the Court finds that the case upon which the petitioner primarily depends, *Wade* v. *Mayo*, 334 U. S. 672 (1948), is in nowise controlling. It therefore follows that the lone special circumstances upon which petitioner depends, namely, his "youthfulness, . . . his lack of formal education, his timely request for the appointment of counsel, his inability to hire a lawyer, and his own fumbling defense," do not show a lack of due process based on the trial judge's refusal to appoint counsel for him.

The record clearly shows, as the trial court found, that the petitioner "is intelligent, well-informed, and was familiar with and experienced in Court procedure and criminal trials, having been previously tried on different occasions for careless and reckless driving, for breaking and entering, for driving while under the influence of intoxicating liquor, and for assault and robbery." Only at the previous term of the same court, petitioner had defended himself on the assault and robbery charge and was found not guilty by the jury. But what more could emphasize the petitioner's ingenuity in defending himself than his defense here? It was simple and direct. Both he and his codefendant had this story: The victim, before entering the car, had been drinking beer and on the way home gave petitioner the money to buy a pint of vodka. After they all partook of the vodka the victim became ill and nauseated while sitting in the back of the car. The petitioner then got in the back seat, and when the car

was stopped he helped the victim out and the latter fell down on the ground. Petitioner then got back in the car and his group drove away. After leaving the victim, petitioner's codefendant found the billfold in the car. It "almost went behind the [back] seat." It had no money in it but petitioner proposed that they take it back to the victim. They then returned to where the victim got out of the car but he was gone, and although they "got out and hollered for him," he could not be found. After the defendants left the scene, the billfold was thrown from the car by petitioner's codefendant and was not produced at the trial. This was indeed a shrewd defense. The only trouble was that the jury did not believe it.

On the facts of this record, I can see no basis for saying that petitioner was denied due process, *Betts* v. *Brady*, *supra*, and accordingly would affirm the judgment.